

NOT FOR PUBLICATION

DEC 14 2005

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICK J. BACON,

Defendant - Appellant.

No. 05-30054

D.C. No. CR-04-00160-EFS

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

Submitted December 6, 2005^{**}
Seattle, Washington

Before: GOULD and BERZON, Circuit Judges, and SCHWARZER,^{***} District
Judge.

^{*} This disposition is not appropriate for publication and may not be cited to
or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral
argument. *See* FED. R. APP. P. 34(a)(2).

^{***} The Honorable William W Schwarzer, Senior United States District
Judge for the Northern District of California, sitting by designation.

Patrick Bacon appeals from his sentence for one count of armed bank robbery in violation of 18 U.S.C. §§ 2113(a), (d). Bacon committed his crime and entered a plea agreement before the Supreme Court decided *United States v. Booker*, 125 S. Ct. 738 (2005), but was sentenced two days after *Booker* was decided. Bacon makes three arguments about why his sentence was unconstitutional. We do not agree with any of them, and so affirm.

First, Bacon claims that his post-*Booker* sentence violates the Ex Post Facto Clause. This challenge fails, however, because the Ex Post Facto Clause does not apply to judicial interpretations of statutes. *See Marks v. United States*, 430 U.S. 188, 191 (1977); *United States v. Ruiz*, 935 F.2d 1033, 1035 (9th Cir. 1991).

Second, Bacon contends that his post-*Booker* sentence violates the ex post facto component of the Due Process Clause. This challenge is, however, foreclosed by *United States v. Dupas*, 419 F.3d 916 (9th Cir. 2005), which held that the “retroactivity principles of the Fifth Amendment’s Due Process Clause” do not preclude the retroactive application of *Booker*. *Id.* at 918.

Third, Bacon argues that his sentence violates his Sixth Amendment right to a jury trial because the district judge increased his sentence on the basis of extra-verdict facts. Bacon probably waived his right to appeal this issue in the plea

agreement. Even if he did not, it is clear that Bacon's sentence did not violate the Sixth Amendment. Under *Booker*, judicial factfinding under an advisory Guidelines regime does not violate the Sixth Amendment. Bacon was sentenced post-*Booker*, and the district court explicitly recognized that the Guidelines are advisory, not mandatory.

AFFIRMED.